UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	
	:	Chapter 11
W.R. GRACE & CO., et al.,	:	
	:	Case No. 01-01139 (KJC)
	:	
Debtors.	:	(Jointly Administered)
_____	:	

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware
June 15, 2016
1:01 p.m. - 3:20 p.m.

B E F O R E :
HON KEVIN J. CAREY
U.S. BANKRUPTCY JUDGE

ECRO OPERATOR: AL LUGANO

HEARING re Anderson Memorial Hospital's Motion to Alter or Amend Order Denying Class Certification.

Transcribed by: Sonya Ledanski Hyde

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ALSO PRESENT TELEPHONICALLY:

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P R O C E E D I N G S

THE CLERK: All rise.

THE COURT: Good afternoon, everyone.

GROUP: Good afternoon, Your Honor.

MR. O'NEIL: Good afternoon, Your Honor. James O'Neil, Pachulski, Stang, Ziehl & Jones appearing today with my co-counsel, John Donley from the Kirkland & Ells firm, on behalf of the reorganized debtors. And, Your Honor, with us in the courtroom today is Richard Fink, our client.

This is the time for the hearing on Anderson Memorial Hospital's motion to alter or amend order denying class certification.

Your Honor, I'll turn the podium over to the movants; if that's acceptable.

THE COURT: Very well. Yes. I mean, unless there's anything preliminary, let's just jump right in.

MR. O'NEIL: Okay.

MR. SPEIGHTS: May it please the Court, I'm Dan Speights. I've represented Anderson since its initial filing in South Carolina. With me today is my bankruptcy counsel, David Rosendorf, who is sitting next to me, of the Kozyak Tropin Law Firm in Miami. Next to him is Gibson Solomon, he's my law partner. And of course, next to him is Ted Tacconelli, Delaware counsel.

I also note, for the record, that Judge Sanders,

property damage future claimants' representative and his counsel, Adam Rich, are also present in the courtroom.

Your Honor, directed us to address class certification, and that is what we have attempted to do. I am not one to simply read my briefs back into the record, I would like to emphasize a few points on the class issues.

If bankruptcy issues arise I may ask Mr. Rosendorf to address those, who is the bankruptcy counsel, I am an asbestos lawyer and class action lawyer. Although obviously over the years, in this Court, I've become familiar with many issues involving bankruptcy and asbestos cases.

Your Honor, I'd like to start with the ultimate question, as I see it. And the ultimate question is, why should this Court certify class action. And I believe there are several reasons the court should do this. They are set forth in the brief, but I want to highlight exactly why we believe the Court should do this.

And the first reason is, is in the interest of this Court, the bankruptcy court, to certify a class action. If this Court certifies the class action, you will avoid repeated hearings where, they call them Section 2 claimants, and I call them Category B claimants, they are one and the same; and I may go back and forth on terminology, but where the Section 2 or Category B claimants will be before you on some regular basis, I --

THE COURT: How many are there now; do you know?

MR. SPEIGHTS: I don't know how many there are, but the Murtaugh affidavit, which is in the record, shows that there are thousands of buildings out there, how many of them will choose to file individual cases is a great unknown. But, Grace has said there are a substantial number, I can represent to you that we will file enough to satisfy Judge Walrath's bottom line number, if the class is not certified.

Super imposed upon all that issue is, when can they be filed? If you have a class, they were all filed as of the bar date in March 2003, as members of the class as Judge Walrath's holding, which is pretty standard class action law.

If there is no class, then the issue is when do these thousands of building owners accrue, because until their claims accrue individually, they cannot bring a lawsuit and would be subject to a motion by Grace to dismiss the case, because they have not yet accrued.

I don't know, but I will say that the data we've submitted in the Murtaugh affidavit, which is an exhibit, shows that there are as many masonry fill claims out there as there are ZAI claims. Almost the exact amount of product was sold over the years, and of course Judge Fitzgerald certified a class for ZAI, finding that there was ample

support for numerosity, and there are at least that many potential claims out there.

I'm going to discuss masonry fill a little later, I don't want to get -- go down the road, but the bottom line is I don't know, but I think there's ample evidence to find that they are enough to meet numerosity.

THE COURT: Well, Judge Fitzgerald found that there was not.

MR. SPEIGHTS: Judge Fitzgerald found that there were none, because she thought, at the time, prior to the filing of the plan, filing to her appointment of Judge Sanders as the PD future claimants' representative, she found, at that time there were none because all claims had to be filed by the bar date, and there was no such thing as a future PD claim.

Well, things change. Grace asked Judge Fitzgerald to appoint Judge Sanders as the future claimants' representative and once that future claimants' representative was appointed, there was an acknowledgement that there are future claims out there, the bar date does not control. I disagree, respectfully, with Judge Fitzgerald and her initial holding, but regardless, shortly after she made that ruling things changed.

And the first thing was, and I think the most important thing was the appointment of Judge Sanders as the

future claimants' representative. The second important thing was that the district court, Judge Buckwalter, ruled that claims do not accrue when Judge Fitzgerald thought they accrue. Judge Fitzgerald granted summary judgment against the State of California, found the statute had already run, as part of her thinking about it with no few claims when California recognized it had asbestos in buildings, and actually did some work on that. And Judge Buckwalter ruled, and the appeal of that case, and Grace chose not to appeal that ruling to the Third Circuit, that no, claims do not accrue until there has been injury, defined as asbestos contamination, which is almost a universal rule. So that's the second thing that changed after Judge Fitzgerald ruled.

You've got the appointment of a PD FCR, you've got the California decision and then you have the troika of cases, and this is a Rosendorf area of law, obviously Frenville, Grossman's and Owens Corning, which changed the law in the Third Circuit. But in this case, in Frenville, which recognized you did not have a claim to file until you had injury. So again, that is supportive of the district court's opinion as well. Those people were not required to file proof of claims by March 31 of 2003, if they were not injured, in accordance with state law.

And state law, as Judge Buckwalter has recognized, almost universally, is that you cannot bring an asbestos

building case until there is contamination, a fact which historically and consistently -- it's not the word I usually choose for Grace, but it has been perfectly consistent since the 1960's that their products do not contaminate prior to major demolition activities. So we have those changes.

And then finally, we have the plan itself. This, again, after Judge Fitzgerald denied certification, the plan itself which Grace proposed was based upon expert testimony that there would be a substantial number of PD claims. And certainly nobody believes that Grace was talking about 47 claims, which is Judge Walrath's number for certifying her case, or 40, as Professor Miller says you need to justify a class action. Nobody believed that. They were talking in terms of thousands of claims in.

Grace says, well we didn't know exactly how many, but they would be substantial. And I'm not faulting Grace for taking that position; I agree with Grace. But Grace took a calculated risk. Grace decided on the appointment of a PD FCR and decided to tell Judge Fitzgerald, Judge Buckwalter and the Third Circuit that there was substantial PD claims and ordered that it could get a 524(g) injunction. And it needed the 524(g) injunction for property damage claims so that it could get a billion dollars, actually a little more than a billion dollars, from Sealed Air. It was a requirement of the Sealed Air settlement.

So when I say Grace took a calculated risk, I think it was a smart risk, even if you want to certify as a class, because they came out more than a billion dollars ahead, by promoting the position that there were substantial PD claims out there, and they got their 524(g) injunction.

THE COURT: Okay. So, let's just, for the moment, assume that that's true, what about the position that Judge Fitzgerald took saying, with the opt-out feature, you end up really diluting any benefit, if there is one, to a class action? How do you respond to that?

MR. SPEIGHTS: Well, if I understand what Judge Fitzgerald is saying, and I believe my recollection is clear on that, it may not be, Judge Fitzgerald was very protective of the bar date order. It was an extensive bar date order, it was publicized extensively, although for property damage claimants, unlike ZAI claimants, she did not approve a television component upon the representation by Grace that the product was not in residences. But in any event, she was very protective of the bar date, of a PD bar date.

I have a couple of comments on that. First of all, I understand, having now dealt with a lot of bankruptcy lawyers since 2001, that there is a tension between the bankruptcy thinking on these issues, get a bar date, you marshal the assets, you have the creditors there, you get rid of it and you move on to more fertile cases. And in

class action, which the idea is, starting with the cases of In Re: American Reserve, and continuing almost until today, that it's important, especially where you can't give actual notice to people, but even when you can give actual notice, that you have all the claimants before the Court, and disperse justice to all the claimants and not to just those who may not have ever heard of a bar date. Another statement that Judge Walrath talked about, the people who don't even know about a bar date.

So I understand the tension, but I believe the class action law, starting with In Re: American Reserve, and going through all the circuits that have then considered it and this Court, and other courts in the Third Circuit, that Judge Fitzgerald did not appreciate what a class action could provide. But, having said that, and in defense of Judge Fitzgerald, at that time there was no position put forward by Grace, I tried to argue it, that there would be additional claims out there. That was -- and Judge Fitzgerald says on the record at the 2007 certification hearing, July 5, 2007, that she didn't believe there were future claims out there.

So what she said in her order naturally follows with the information that had been provided her at the time, and what Grace's position was. But I keep going back to this. Judge Fitzgerald changed her mind within months, when

at Grace's request, not my request, she appointed Mr. -- Judge Sanders to represent all these claimants who did not file claims by the bar date. If we were limited to the bar date, why did the estate pay Judge Sanders and his counsel, and rely upon Judge Sanders and his counsel throughout the confirmation proceedings? To support the fact that there were -- would be substantial future claims, Judge.

It just seems to me Grace cannot have it both ways, and I've said it over and over again in a brief, and I can't add much to that, except if they are substantial claims, then Judge Fitzgerald's statement, we don't have to say it was wrong, it's inoperative. Because now Judge Fitzgerald, having approved the bankruptcy plan, recognized herself that there would be substantial claims, contrary to her certification order.

I hope I've addressed the question, Judge, but that's -- I'm not here to argue so much that Judge Fitzgerald was wrong, while I disagree with her, and while I tried to appeal it. I'm saying that the facts now that have occurred since Judge Fitzgerald ruled, have completely changed the landscape and have presented an entirely new picture. And I think it's important, and I will get to it in a while, that Judge Sanders, who actively supported Grace's confirmation, who actively supported the treatment of property damage claims, and who was charged, by the

Court, not as an advocate for one claimant, charged by the Court to represent all these future claimants, is sitting in the courtroom now saying that to adequately represent all these other people, Your Honor should certify a class action. And that certainly wasn't before Judge Fitzgerald in 2007, because the plan had not even been filed at that time.

Your Honor, if I could continue down my notes, but I'm not, in any way, resistant to whatever questions the Court as being important. But --

THE COURT: Well, I've noticed that. You're free to continue.

MR. SPEIGHTS: Your Honor, I was saying I believe it's in the interest of the Court. If there are a substantial number of claims, whether they are 40 or whether they are hundreds, and I might can put a little more meat on the bone about how there are -- how many there could be in a while, but if there are substantial claims, I believe it's in the Court's interest to try the Anderson claims objections under Section 1 or Category A, and deal with all of these in one proceeding, as opposed to having claimants discover that they have asbestos materials and Grace manufactured it, and that those materials have contaminated buildings and begin a series of filing claims, which will come before this Court, if Grace objects to them, and I

suspect everybody here believes that Grace will object to claims. It has consistently said, for years, that their claims do not contaminate. And Your Honor will have to go through a proceeding that we affectionately call running the gauntlet.

A claimant will come in here, let's say it's a masonry fill claim for $3,000. He files a claim, Grace objects. And you have to conduct proceedings on that. I've outlined it on the brief as to what all that could consist of, and all of the issues that the Court might have to face going from Owens Corning to accrual standards, as bar date issues, et cetera, et cetera.

And then if Your Honor releases those, and they go back to district court, in the wings will be another claimant come through and in the absence of a class, whatever you find as to claimant one will not be binding on claimant two. And there is no deadline for this procedure running out, theoretically, this could go for 50 years. I don't expect it to go for 50 years, but theoretically it could. There are a lot of buildings, thousands and thousands of buildings, as their own expert testified, with Grace's product, and those claims could continue to come along.

So if Your Honor -- in contrast, if Your Honor certifies the class, what will happen then? Well, the first

thing Your Honor will do, I believe, if Your Honor follows what is normally done in these situations, you will issue an opt-out notice. By the way, when you certify the class, it's subject to additional review. Grace can ask you later to decertify that class. And once you've certified a class, you have wedded yourself to that class for the rest of the time on the bench, Your Honor.

Under Rule 23, a trial court has great flexibility to deal with class actions, as they should be, through managed class action suit, modify certification orders. It's an essential ingredient of class action law that is used every day in the class action world.

But if you certify a class, you will issue an opt-out notice. The opt-out notice will go out, it'll be published, maybe some direct notice as well, and it will say to all these claimants, Category A, Category B, Section 1, Section 2, if you don't opt-out by a certain date, a date Your Honor will decide, 60 days, 90 days, whatever, then your claim will be forever barred.

And unlike a bar date order, the class, which I will be prepared to argue in a few minutes, includes both accrued and unaccrued claims. It includes all claimants. It includes masonry fill and (indiscernible) and all products. So if you issue a bar date order -- excuse me, if you certify a class and issue an opt-out order, if they

don't opt-out of this class, that's the end of it; they don't have another day in court. They can't come before you and run the gauntlet. Everybody's in the class, except those who opt-out.

Now, how many will opt-out? If we follow Grace's logic that not really anybody out there wants to pursue an individual litigation, under that logic, there will be no opt-outs. I don't buy that logic completely; there will probably be a few opt-outs who would rather proceed individually, file a motion and try to head to Spokane, Washington or Phoenix, Arizona or somewhere and litigate their case in a district court.

My point is, Your Honor, the best argument that this is in the interest of the Court is, that it brings closer. It takes a proceeding with no deadline on how to resolve it, and says, once that opt-out period is, we'll know exactly, exactly how many individual claims there are who will proceed individually and go to the gauntlet, because they will be the opt-outs, be there three or 48 or whatever. We will get rid of all the uncertainty on that.

And of course, the converse is, if there were too many opt-outs, Your Honor can say there are too many opt-outs, I'm going to decertify this class that I certified. I've decided, in light of those circumstances, that doesn't make sense. That's -- that happens occasionally in the

class action world that there are too many opt-outs. I don't think that's going to be the case. Your Honor, that will be closure.

Then what happens next? We have a defined universe of what this class represents. Unless we settle, a word which I do not dislike, unless we settle, there will be a trial. If Your Honor, and I almost don't want to say this, Your Honor, but if Your Honor rules against them, you find in favor of W.R. Grace on the merits, subject to whatever appeal we might take, that's the end of it. You've decided against all of the property damage claims, less opt-outs, in one trial, a trial which will not take an inordinate amount of time.

Suppose Your Honor rules, well, Grace is responsible and we have a pot of money to deal with. Or better yet, suppose the parties all of a sudden agree, in light of the certification, to have settlement discussions and resolve it.

That's exactly what happened in the ZAI case. Grace vigorously opposed class certification for years, vigorously. But at the end of the day, they worked out an agreement, and they agreed to a certification and moved on.

Well, what happens then? I'm trying to make sure -- and I think it's important Your Honor knows where we're headed. If we settle or there's a verdict, there are

recognized, well accepted, often used procedures to divvy up the pot. In the world of asbestos litigation, there's school class, which we certified and affirm on the Third Circuit, the colleges class, which was certified and affirmed by the Fourth Circuit, and a multitude of state class actions, which are referred to in our initial (indiscernible) process those claims, sometimes by appointing an independent claims evaluator.

The judge doesn't do that, the class action judge does not sit down and then evaluate 50 or 500 claims. There's a claims administrator, there's a process and there they are processed. Some of these cases provide an appeal to the district court, some of those provide a processing agent's evaluation as final. That's -- Your Honor could decide if we go down that track.

Let me also say there is ample experience in the bankruptcy world for how you process claims once you have determined a pot of money. In the -- in just those cases I've been involved, in the Manville bankruptcy there was a processing -- there was a PD trust created for this amount of money and the Court appointed someone to process those claims, a claims evaluator. The same was done in the Celotex bankruptcy down in Tampa, Florida.

Judge Fitzgerald had three other debtors that Anderson had claims against, Mogul -- Federal Mogul, United

States Gypsum and U.S. Mineral. And the Mogul and the U.S.G. cases there was a settlement, we agreed upon a pot of money. Judge Fitzgerald actually sent those cases back to South Carolina for the state court judge to process those claims. The state court judge in turn appointed somebody to assist him in that endeavor.

And the U.S. Mineral bankruptcy, which is currently pending before Judge Gross, Judge Fitzgerald appointed a claims administrator, Mr. Hilton out of Texas. Mr. Hilton processed those claims. Anderson actually had a dispute with Mr. Hilton over the amount that he awarded Anderson. That matter came to be heard before Judge Gross. Judge Gross ordered us to mediation before Chief Judge Magner of the New Orleans Bankruptcy Court. She got us to knock some heads and got us to resolve it. And now Judge Gross has approved that settlement.

That's sort of a long, winding story to tell Your Honor that I'm not asking you to do anything that has not been done multiple times in the past, both in the sense of class action litigation, and class action settlements and class action settlements within bankruptcies and plans which provide for the payment of property damage claims.

So I believe it's undisputable, frankly, Your Honor, that the class action will bring closure and will bring closure far sooner, years earlier, then the Court --

this Court will ever have closure on having all these individual claims out there which, again, there's no deadline for bringing them.

THE COURT: So what makes you so confident that if a class were to be certified, that any notice that would go out, by publication or otherwise, would be sufficient or any better than what Grace did in the first place?

MR. SPEIGHTS: Well, Your Honor, I have two answers to that question. The Third Circuit has ruled that Grace's notice was sufficient to provide minimum due process under the standard of the Supreme Court. And I understand that. Kirkland & Ellis, representing Grace, at the time said the purpose of a bar date notice is to define the universe. And Grace wanted to provide minimum due process to define the universe, they didn't want to expand the universe. And I understand, from a Debtor's standpoint why that was its attitude. And the Third Circuit has said that was sufficient. And I'm not challenging the bar date order.

But a class action lawyer would support going out with two notices. First of all, we could go out with the same notice that Grace went out with, but in class action that applies both to accrued and unaccrued claims. We could go out with the same notice, and presumably under the same Supreme Court authority, that would be binding, but it would be binding on a much larger group than the bar date notice,

because under Frenville and under everything that's happened since, that bar date notice does not bind those whose claims had not accrued and those future claims, which were the subject of the confirmation order.

So it may be. I'm not saying I wouldn't try to do a better job than Grace, and I don't think they would care if I tried to do a better job. For example, with residences involved in this case, particularly masonry fill and textures on ceilings of churches and buildings and other, I believe there should be a television component. I think that it should be brought.

Again, that may not be constitutionally requirement, but I'm a fiduciary for the class, I want to get the best notice I can to the class. I would also attempt to get -- I would probably ask you to revisit, see if there are any more records available to give more direct notice.

It's really undisputed, despite their contrary arguments in the record, I think it's undisputed now, the only people that have got direct notice of the bar date order were the lawyers who had represented asbestos PD claimants in the past.

But leaving that aside --

THE COURT: With the notion that they would be the ones best able to convey the notice to those who should get

it, right?

MR. SPEIGHTS: I think that was the thinking at the time, although there is much confusion on that issue that I had talked about for a long time. I don't think Your Honor wants me to do that. But certainly, there's a -- there was a belief by some, including Judge Buckwalter, that they had noticed hundreds of thousands of people, that never happened. The PD bar, at the time, the lawyers -- it was a very narrow group of lawyers. I was one of them, and I got direct notice on behalf of Anderson. I still believe that I filed a proof of claim for Anderson, a class proof of claim that covered everybody.

Mr. Diaz down in Texas, a prominent property damage lawyer, and Mr. Westbrook down in Charleston, South Carolina, another property damage lawyer, our three law firms probably had represented, in conjunction with co-counsel, have probably represented, I don't think I'm overstating it, 90 percent of the property damage claimants over the years.

It's not like asbestos PI case where now you can't turn on the TV at night without discovering another law firm wanting a PI case. They're not -- PD lawyers are not ubiquitous. Okay? But as these cases arise, and they have a right to bring these cases, and people go to a lawyer in Dubuque, Iowa or Hampton, South Carolina, they may or may

not associate one of the lawyers I mentioned, or somebody else with experience. But there's no question that was a theory that we'll serve the -- at least the prominent three, or four, or five PD lawyers and see what happens. And those -- all of us filed cases. All of us filed claims, including Anderson.

But, I said it was a two-part answer to your question. How would you do notice? I would do notice at least as good as Grace, which under the Third Circuit authority would probably be sufficient under due process to bind the class. And the class consists not only of those who file notices before the bar date, but includes all future claimants as well. But I tell you, Your Honor, that would be the first step in my attempting to communicate with the class. Because once we get the opt-out notice done, I will take every step imaginable, every step reasonable, to identify, specifically, all those claimants to actually have a specific identification.

And there are other ways beside publishing a notice in the New York Times and The Wall Street Journal to try to get those notices. And for example, we have the sales records for many of their products. I tried to get some more, that's another issue for another day, but we have sales records where we can continue to push and try to get those identified.

And some of these buildings are large buildings. And I think I said it in the initial motion, in the Celotex bankruptcy Anderson filed 50 -- they filed more than 52, Anderson had 52 claims allowed with Celotex's fireproofing product in 52 buildings, that's all. Grace had, as the largest manufacturer of fireproofing in the world, sold a lot more than Celotex, in my belief it'll be more than 52. But in any event, 52 claimants. And the process there that was proceeded in the bankruptcy court down there, and the claims administrator, there's an order, which I think is in the record, Judge Glenn, of the Tampa bankruptcy court, approved a settlement, approved any allowance, which was around $250 million. I didn't get -- my clients didn't get $250 million, we got 12 cent on the dollar. I wish that had been a hundred cent plan like this is a hundred cent plan. But in any event, it doesn't take a whole lot of big buildings to produce a whole lot of money. And those can be more easily identified through some notice program.

And the fellow who owns a house with masonry fill and the concrete blocks, who will not know about it, much less what it is, or who made it, or has asbestos or anything else, until he starts some demolition activities and a good contractor will say, wait a minute, I'm not going in that wall until this thing is tested. I'm not going to expose myself to asbestos. Where if when he realizes he's got to

spend some money for that, not a huge amount of money, a few thousand dollars to deal with that problem. How do you notify all of the homeowners? And I suggest that it's done very much like the ZAI class counsel are doing. They have set up a program, in conjunction with Judge Sanders and his lawyer being a part of that, to try to have an education program for people. We will have a website and we will do all the things that class action lawyers do. But particularly on masonry fill there needs to be an education program, there needs to be a fund set aside, and so when, over the years there is a claim, when people discover it, they have somebody to make a claim against. And that's the class action fund; that's not coming to run a gauntlet before Judge Carey in Wilmington, Delaware. You're done with it if we have a class action resolution of it.

Again, you will approve these procedures and I'm sure Mr. Donley and I will disagree about some of them, and we'll figure out how to do it, but if two parties ever want to settle they'll do it, as they did in ZAI. But even if it goes to trial, and we get a verdict there, we can get closure on it by proposing a set of procedures and hopefully deal with it.

Let me say something else. This is far ahead of the argument I will make later. There's an extra set there, Judge, that I've never had in a class action before. I've

got somebody looking over my shoulder. And that's good, it's good for the class. Judge Sanders is sitting back there, who's one of the most distinguished jurists in my part of the country. He's got an obligation to make sure everything is on the up and up, it's fair to his future claimants. He has his responsibilities as I have a fiduciary responsibility as a lawyer, and I take them seriously. And they have not challenged my adequacy in this case. As Anderson has its fiduciary duties.

We've also got a court-appointed, retired judge to make sure that everything is on the up and up. Judge Sanders was instrumental in bringing the parties together in the ZAI resolution, and is instrumental today. I mean, he continues to be involved in that process today to make sure claimants are properly taken care of.

That's a very long answer to your question how do you give notice. Well, we had the initial notice, which will be Grace plus something. And then we have all sorts of ideas of how to gain a great deal more notice so we can fairly represent the class.

My next point, Judge, and I'll be brief on this one, is in the interest of the district court that this Court certify a class. Now, again we go back to how many are there. It's sort of a chicken and an egg thing, with how many are there. But I don't take a position, as I stand

before you today, on whether someone can bring a case for less than a jurisdictional amount in a district court. That's what the plan provides.

And suppose it's a masonry fill claim and it's a $7,500 claim. The plan says, if that claimant effectively runs the gauntlet before Your Honor and gets released, he can go back and file a case for that $7,500 in a district court. I see both sides of the argument. It's not my argument; I don't have a dog in that fight, unless I don't have a class action, then I'll have to deal with it. But I can tell you, having practiced for a fair number of years, I can foresee some district court judges looking down and saying to me, Mr. Speights, you want to litigate a $7,500 case in the district court of South Carolina? How many more are there? Can I could -- I'm not sure what I will say, but I'll say, Your Honor, there are hundreds of thousands of these claims out there, I don't know how many.

And he might turn to me and say, well why don't you just bring a class action, Mr. Speights? I mean, that's the way we deal with all these claims. Can't do it, Judge. The plan says, according to Grace, you can't bring a class action in a district court. Anderson is the last best hope of these claimants to have class treatment. So when I say it's in the interest of the district court I'm not sure that a district court wants to be having to face these cases.

And this is an unusual case, a hundred cent plan which Grace says, go back home and bring your lawsuit. I'm not sure that the district court is going to be excited that these hadn't been wrapped up, except for the opt-outs.

Lastly, Your Honor, on this point, I really believe it's in the interest of the claimants. And I believe Judge Sanders has said the same in his joinder in the motion. Here you have all these claimants out there with claims, not everybody wants to bring a lawsuit, that doesn't mean they're not entitled to be members of a class. Not everybody knows they have a lawsuit. Not everybody has a claim that's wroth enough money. Not everybody has enough money to pay a lawyer to bring a lawsuit. Not everybody wants to bring two actions, hire somebody like Mr. Tacconelli and their own lawyer, and get involved in this Courtroom, to get a -- what I call it, to get a slip of paper saying, you can go back and bring your own lawsuit, and then go litigate for two to three years, and all the appeals and motions, et cetera, et cetera. And maybe that case is reversed and you come back again and retry the case. I've had cases, individual cases that have gone on, not as long as Anderson, but for a number of years.

I think it would be very appealing to claimants to participate in a class action. And that's not just based upon my representation in this Court, but it's based upon

some history of class action litigation where we wrap up the claims of a lot of people. And I think that, I'll argue the law in a little while, but I think that affords people a superior method of proceeding. And it gives them a choice, and again, I believe Judge Sanders will say that he believes it's in the interest of claimants to have that option.

So, I've dealt with my first question, Your Honor. I don't want to be accused of filibuster, but I have several other points and -- that I think are important. Obviously this is an important case to my law firm and obviously an important case to Anderson Hospital which has been involved in this for years, and I want to make sure that the Court understands where we're headed and not only what we're asking the Court to do, but what we are not asking the Court to do.

Let me talk about class action law, very briefly. I know this may sound like hyperbole, but I have never argued a class action with stronger grounds for certification than this. And I'll tell you why. I first got involved in class actions in 1984, after trying an individual asbestos case. I probably had never mentioned the word asbestos before then. When the Berger Law Firm in Philadelphia, which had filed an asbestos class action, asked me to bring a South Carolina school district to Philadelphia and be a named plaintiff so that it could get

complete diversity in a federal class action. And I did so, along with co-counsel. That school district was Barnwell School District, 32 miles from where I live. And it was the lead plaintiff in what we call the schools litigation, the national schools class action.

I cannot imagine having a stronger precedent for a class action certification, than the schools class action, which is a Third Circuit case. The Third Circuit is known as the best class action circuit court in the nation, although some people argue the Eleventh Circuit. But it essentially has been historic in its class action decisions going way back. And here you have the Third Circuit certifying a class action on behalf of all the school districts in the country, an asbestos property damage class action.

And Your Honor, leaving aside the plan, which I think even makes this a better certification. The facts just of Anderson versus the schools' class action show that Anderson is much more a candidate for class certification. The schools class action not only involved Grace, but it involved 71 defendants with hundreds of products. This case involves one defendant, with essentially what it calls vermiculite products. That other cases was far more difficult, far more difficult to deal with than the Anderson case. And it was certified, and it lead to a number of

other asbestos property damage classes certified around the country, including the Fourth Circuit certifying a nationwide class action, including the Common Pleas Court certifying a nationwide class action on behalf of lessors, people who leased building to -- buildings to the federal government, and state class actions in Michigan and Texas. All of these cases are cited in our initial motion.

So not only do I have all this precedent, but I've got a Third Circuit case directly on point, but even better. And then to top all that off, Grace, which for reasons apparent to me, waited to way back towards the end of its response, to deal with the class action issues. It did that for reasons unknown to me, but Grace consented to that class action in Philadelphia. Grace was the one that went to the court, with Mr. Berger on April 9, 1984, and got Judge Kelly to conditionally certify a class action, Grace and two of its codefendants.

So I can't imagine having stronger law. I'm not going to read all -- refer to all the cases, but I will tell you that in case distinguished adversary comes up and say -- says something like, well that was a long time ago, 1984, it might seem like yesterday to me, but I can understand if the Court thinks that was a long time ago.

THE COURT: Not to me.

MR. SPEIGHTS: But it's not what just happened in

'84, two other things. The ZAI certification was not long ago, and grace consented to the ZAI certification as well.

And then among all the cases we've cited, I would invite Your Honor to a 2015 case. Neale versus Volvo, it's in the briefs but it's 794 F.3d 353, and which is just one of the latest Third Circuit cases reaffirming class action law, and citing Judge Posner, a very famous case out of the Seventh Circuit, for the proposition that a class will often include persons who have not been injured by the defendant's conduct. Indeed, this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known, still the facts varying on their claims may be unknown. I mean that case, which was decided actually on my birthday last year, reaffirms that in class action represents accrued and unaccrued, known and unknown claimants.

So I tell Your Honor that the Third Circuit has not backed off. Actually, I think in April the Third Circuit decided the NFL case, got a lot of publicity, and they restated all the general principles of class action law that are perfectly consistent.

But then I get to the plan, not the planned defenses, the technical defenses which I assume in reply we will have to address, because I assume that Grace has some statements to make in light of our reply brief about our

defenses to its technical arguments; and we'll be prepared to address those in reply. But, the plan itself, on the merits, makes this case even more certifiable. I mean, I'd be happy to argue certification if were standing in the district court with no bankruptcy ever having taken place, in light of the school asbestos case and all the precedent. But in this case we have a plan, and forgetting whatever barriers which Grace says there are to our proceeding this way, and I don't think there are, Mr. Rosendorf will address that. But just the plan itself greatly simplifies, greatly simplifies this whole procedure.

For example, Your Honor, under the plan, under Section A, Section 1, we have essentially a claims objection proceeding; that's what it essentially is. They objected, they filed their omnibus objection to claims, their 15th omnibus objection, and they objected to Anderson's individual claim and Anderson's class action claims. And therefore, under the BDCMO, they are set down for Your Honor to decide. And --

THE COURT: I'm glad you referred to the CMO, was that order ever signed by anybody?

MR. SPEIGHTS: Not to my knowledge, Your Honor.

THE COURT: Why not? Do you know?

MR. SPEIGHTS: That's a Grace question, Your Honor. I do not know. We've raised that issue, and we

think it has implications, which Mr. Rosendorf will be prepared to address. But I don't know. It has blanks for you to decide. It has some changes, since the, you know, original one was attached to the plan, et cetera. But I don't know that. And I think that might be significant, but I'm out of my area when I talk bankruptcy.

In any event, what we do know is under track A, we have a very limited trial. You know, they raised the hazard defense, for example, and that's a big issue in these cases. Is the product unreasonably dangerous, was it defective, or is it unsafe, or does it contaminate? We all have our definitions of that, but essentially -- and I believe they call it the hazard defense that they have, that is an issue which will be tried before Your Honor, for Anderson, whether it's a class or an individual case. And that's a case that will be tried if there is no class and people have to proceed to their district courts. That's one of the issues. We have to try that.

But there are a whole lot of other issues that these individual claimants will have to get tried if they go back to district court, that are not in the CMO for what we have to try. There's no requirement in that CMO that we have to try liability, for example, that is what did Grace know and when did they know it. All those thousands of documents I have in the office will sit there, representing

Anderson, because Anderson, at least alone and hopefully as a class, is going to be litigating under Section 1 or Track A where that's not an issue.

We've got the hazard issue, they may say we have something else, but we have a much more confined trial or claims objections proceeding than those who have to be released to the tort system start doing what I started doing many years ago.

So in my opinion, Your Honor, and I would urge the Court to say -- to find that the issues, such as commonality, are much easier in this case. There's commonality anyway under the school asbestos case, but there are clearly less problems in litigating it under the CMO than going back elsewhere.

Your Honor, the other thing is, I don't think Grace disputes this, although its brief is, I'm going to say ambiguous to me. And there's a point I said -- made earlier, and I want to keep making. If we go back and try the class action, we will eliminate so many issues, because all of the claims will be part of Anderson, which filed its case in 1992, for statute of limitation purposes in 1992. Grace is going to be hard pressed to say Anderson missed the statute of limitations, or people should have been filing cases before 1992, when it still says there's no problem with their product.

And all of the members of the class will have filed claims in this Court before March 31, 2003. We have just eliminated a host of issues and simplified the trial. So Your Honor, I would say despite the Third Circuit cases and all the other cases, et cetera, this is clearer -- a more clear and direct way to go.

Let me comment briefly on what Grace says on the merits, and then I'll sit down. John Adams said that facts are stubborn things, and there are some very stubborn facts here that Grace does not address or it does not directly address. The first I mentioned a while ago. First two, Grace consented to a nationwide class, it consented to a ZAI class. The third fact, which Grace glosses over, the site that the PD FCR now supports this motion.

The PD FCR and I disagreed during confirmation. The PD FCR was sitting on that side helping Grace, because it wanted a plan of reorganization and it thought that futures were being treated as well as present claimants.

THE COURT: He says so in his joinder and says, but now it seems like a good idea.

MR. SPEIGHTS: Well, and that -- it's apples and oranges, Judge. In the confirmation proceeding, the question was, we challenged there's really -- we challenged the fact that Anderson was the only property damage claimant that had to try its case in bankruptcy court without a jury

rather than returning to the tort system. Grace argued the opposite, Judge Sanders supported them. It's a question of -- almost a question of venue. Well, I lost. The Third Circuit said, you're getting the same amount of money on the dollar, if you win, wherever you win. And that's the essence of a quality of treatment, so purposes of 524(g), there's equality of treatment here and we agree with Grace and Judge Sanders. In effect, they said we're all the same, Anderson claimants and other claimants, we're all getting the same amount of money.

Now it's an entirely different issue. Now we've got all these claims, we've got the Anderson claim and we've got all these claims that are under Judge Sanders umbrella and some that have probably moved, in the ensuing years, from Judge Sander's umbrella to the present claims umbrella. The question is, how do you try them. Do you try them individually, one by one or you try them in a class? There's nothing in the plan, there's no position I've taken that's inconsistent with the position I've taken before the Third Circuit saying I'd rather be in South Carolina. And that's with all due respect to Judge Fitzgerald, who was the judge then, I'd rather be back in South Carolina trying my case before a jury. But if I was in South Carolina I would still be arguing in favor of a class. And I would still try to get a class notice sent so that people could not -- so

that people would have the option, all claimants would have the option.

It's just a question now, I'm in the bankruptcy court, which is fine, we're happy to be here. It's the same issue that I would have had if we were in South Carolina. Can we send -- can we -- is the trial -- is the -- will a claimant receive superior treatment, or a bulk of defendants receive superior treatment by being a part of the class action. That issue has not been decided and there's nothing in the history of this bankruptcy litigation which affects that decision. It is your decision to make.

And it's just -- I would say it's a simple question, but it is a pretty direct question, at least, of is there superiority here. And all we need to do is read the words of Rule 23 to say, is this a superior way of providing relief for many claimants.

THE COURT: Well Judge Fitzgerald found that it wasn't.

MR. SPEIGHTS: She did. Judge Fitzgerald found that it wasn't, based upon the fact that she thought that all the claimants were before her, there would never be any more claimants, and those claimants could be disposed of them. And she disposed of a lot of claims, a lot of individual claims. But again, and I won't repeat my laundry list of reasons why things have changed since Judge

Fitzgerald ruled, but it's clear that her ruling was based on numerosity. I mean that's almost her exact words.

THE COURT: Was the thrust of it, I agree.

MR. SPEIGHTS: It's -- and let me say to you, more accurately, it's not superior because of the numerosity problems. So she ruled on numerosity and superiority, but superiority was a derivative of numerosity. And I believe there's a quote in Judge Walrath's case, I've got it highlighted over there, numerosity is a practical decision. And I agree with Judge Walrath, and I agree that we have to show numerosity.

And I don't know how -- I believe we've, frankly, done it better than most people would have in an early stage. Normally you file a class action and these days you get a hearing pretty soon and numerosity is essentially self-evident, as I think it is in this case. And if it's not numerosity, you certainly can decide later there should not be a class.

Fact number four, it's undisputed that Grace told all the PD cases could be tried in one bench trial at the beginning of this case. It's a fact that Grace admitted numerosity in South Carolina, on the worldwide class, not the state class. It's a fact that it told the district court and Third Circuit there was substantial claims. And it's an undisputed fact that Grace has always contended that

it's products do not contaminate.

I can't imagine going more than an hour, so let me close on one thing, Your Honor. I'll be happy to go as long as you like. Sometimes, as a famous author of our -- one of our presidents who in studying that president said he used to have a saying, what is important is not what a man says, but what he doesn't say. There are many examples of this that I could point out, but I think there's one particular example I want to point out, that it's not what Grace says in its brief, but it's what it doesn't say in its brief.

And the particular instance, again, I want to refer to is the masonry fill claims. Masonry fill was not listed in the bar date order. If you read the bar date order, the words masonry fill do not appear. And more importantly, whether it was or wasn't, masonry fill is in as many buildings as ZAI was in.

Throughout our brief, Your Honor, I constantly, repeatedly -- I was looking for the numbers, was why my head went down, refer to masonry fill. What does Grace say? The words masonry fill do not appear in its responsive brief. It simply ignores the problem of how to deal with masonry fill claims, the forgotten class of claimants within the umbrella of Anderson's class action.

For that, and other reasons, Your Honor, I would urge the Court to certify a class action.

THE COURT: Thank you. Does the future claims representative wish to be heard?

MR. RICH: Very briefly, Your Honor.

THE COURT: All right.

MR. RICH: I'd like to say a couple things. And Judge Sanders, himself, has a couple words he wanted to speak. Alan Rich, from Dallas, on behalf of the future claimants' representative.

Judge Sanders just wanted to make a couple things clear. First of all, he agrees that factually and legally the circumstances are much different today than they were at the time that Judge Fitzgerald made her initial decision on class certification. Those changes have been discussed extensively by Mr. Speights, in his papers and at the podium today, so I don't intend to actually go through the litany myself.

The other thing that he'd like to say is that there has been a flavor, at least I perceived it, that maybe Judge Sanders has changed his mind in one way or another, from plan confirmation to today, and that's just not at all the case. As Mr. Speights said, the issues really are very different. Before the Court, at the time of confirmation, the issue was essentially whether the type of treatment Anderson was receiving, versus the type of treatment in the second tier of claims, or Class 2, were they substantially

similar under the applicable provisions of the bankruptcy code. We thought they were, we -- Judge tested that they were, and we still believe that they are today.

Notably, one -- there was no third category that we could testify about, and that would have been a class action. Because at the time, obviously there was no class action, it was denied, appeals were not permitted and that was simply not one of the choices. But I think it's self-evident, frankly, that a class action would be vastly superior to either Class 1 or Class 2 in the PD-CMO and under the plan.

We are very concerned about a punitive class member's ability to come to the PD trust and prove, in opposition to what will be vigorous defense, that the bar date, for instance, isn't a problem for a lot of claimants.

The interaction between Frenville and Owens Corning, and its progeny, and the bar date notice and the bankruptcy code provisions about the bar date are very complex and we don't know how that's going to come out. But what we do know is that having a class certified would eliminate any bar date problem for the future claimants. It would eliminate any statute of limitations problems, which could possibly otherwise exist for unknown claimants. Of course, we don't know that, because we don't know their circumstances, because they're unknown, but certainly it

takes that whole thing off the table.

So, you know, we think that all in all, given the vast savings of judicial time and resources and the parties' times and resources and the possible effect on defenses out there that a class action, would be certainly in the best interest of the future claimants that Judge Sanders represents. We've said that in the papers and I wanted to make sure the Court understood that there was no inconsistency between that position and the position we took at trial.

Judge Sanders wanted to say a couple things, very briefly to the Court.

THE COURT: Briefly. That's fine.

MR. RICH: Thank you, Your Honor.

MR. SANDERS: Good afternoon, Your Honor. Let me get one matter aside, briefly. It's not appropriate to call me Judge. I'm not a judge, and I haven't been a judge in so long ago I can barely remember it. Judge Fitzgerald taught me, in this very room, that this Courtroom is not big enough for but one judge, and I'm not the one.

THE COURT: The Judicial Conference on Codes of Conduct has so advised us.

MR. SANDERS: I have no blinding insights into this matter to deliver. My lawyer has addressed the matter quite competently. If you would permit me, I would like to

sit quietly and listen to Grace's position on the matter, and then I might have a word or two to give you, by way of observation.

THE COURT: We'll have a time for a word or two, certainly. Thank you.

MR. DONLEY: Good afternoon, Your Honor. John Donley on behalf of Reorganized Debtors. I know I'm probably as complicit as counsel on both sides with burdening the Court with very lengthy briefs, and for my argument, the key points I wanted to highlight. I tried to winnow them and to pull the points on a PowerPoint, which I'll refer to and have up on the screen.

THE COURT: The only regret I have, Mr. Donley, is that Judge Fitzgerald decided to retire. You may proceed.

MR. DONLEY: I understand she's had a big smile on her face, though, for a couple of years. Thank you, Your Honor.

Let me start with the text of the case management order, which is Exhibit 25 to the plan. And the important point I wanted to start with there is that in the very first line of the PD, property damage CMO, it makes clear that it applies to all, it's exclusive, all class 7-A property damage claims, other than the ones that were previously allowed. It's in the very first line. This case management order provides procedures for the resolution of all Class 7-

A asbestos PD claims.

And then all claims breaks down into two categories that cover the entire waterfront. You're either in Section 1, you have a Section 1 claim, or Section 2 claim. There's nothing else, there's no third category or something you fall out of.

THE COURT: But apparently this is a form of order that has never been signed.

MR. DONLEY: Yes, sir. And I get --

THE COURT: Tell me what that means.

MR. DONLEY: So, I have a -- I don't want to steal my thunder completely, because I have a slide with cites on that later, and I'll pick up then.

THE COURT: All right.

MR. DONLEY: But the order -- there are 35 plan documents that are exhibits, none of them -- or many of them, a majority of them are unsigned, to my knowledge. And they were simply tendered to the Court and when the confirmation order was entered, both the language of the plan and the language of the confirmation order made clear that these exhibits are part of the plan, they're an integral part of the plan. It's not just the document that says joint plan, these plan exhibits are also part of the plan. And the order said, I am entering, in this -- it's I believe page 9 of the confirmation order, I do have a cite

I'll come to later on this, where Judge Fitzgerald says, I am entering this order.

So the question comes up, well why is it still left in a form where there's a signature line for the judge and it's never signed. And I wasn't involved at the time, I don't know. But I think we can sit here today and look at the record, and it would have been redundant, in a sense, because it was entered by the Court, in the confirmation order, in that exact form.

And I know there have been exhibits to the briefs, with a couple of different versions. Exhibit A-1 to their brief was the February 21st, 2011 version, there was a version submitted to the Court on December 8th that's cited in our briefs of 2010 that's identical. We attached our brief, Exhibit 1, a conforming order. It didn't have changes in it at all, it's just we conformed to the current times and we put in Judge Carey, because -- instead of Judge Fitzgerald. The content didn't change; it was -- the provisions were the same at all times.

So that order was entered as part of the confirmation order, is the short answer. So in terms of -- and I'll have the cites on those, which I'll go through very briefly, because I've kind of discussed it already, when I get to them.

So, you're either in Section 1 or Section 2.

Anderson agrees its claims are not covered by Section 2. That's for claims filed after the bar date; no dispute about that. Anderson's -- both the class claims and its individual claims are all in Section 1. And I know there's a little confusion in their brief, because their opening brief called it Track A, but we're talking about the same thing, Section 1. Those are claims filed before the bar date, but not resolved as of the effective date.

And when you then drill down into Section 1(b)(2), the first bullet point, Anderson's class claims, 9911, that's the so called worldwide claim, 9914 is the South Carolina state claim, shall remain inactive. They're pending, but inactive. I'll come to the word "pending" a little later. Unless and until there is a final appealable order with respect to Anderson's individual claim.

And then 1(b)(3) further clarifies, provides a sequence and a procedure that says if the appeal of the denial of class certification is reactivated, and is successful, it ultimately is remanded to this Court for determination. And the last bullet point of 1(b)(3) continues to say, just to be clear, for the avoidance of doubt, Section 2 of the PD-CMO does not apply to the proceedings, the appeal, the remand of the class action certification. So all of that's making clear all of Anderson's claims are in Section 1.

And I did this chart, on page -- the next page, which just basically breaks down Section 1 claims, Section 2 claims. Mutually exclusive, you've got to be in one or the other. Reading across the top row, Section 1 claims, those are claims filed before the bar date. Are individual claims permitted? Yes, of course. Are class claims permitted? Yes. But Anderson's class claim, under the plan, has to remain inactive, pending but inactive, at least for the time being, until certain steps are taken.

After the effective date, the second to last column to the right, what's the litigation sequence for Section 1 claims, like Anderson's? Well, first of all, you've got to litigate Anderson's individual claim until -- if -- there's a final judgment. Number two, you then appeal -- then they reactivate and appeal the order denying class certification. And third, if that appeal succeeds, Anderson's class claims are remanded to this Court for further dealings, all litigated in this Court.

Big distinction for Section 2, and this is the distinction that was fully endorsed and unequivocally signed off by future's rep, Mr. -- I won't call him Judge Sanders, because we've always called him Mr. Sanders at the confirmation hearing. This rubric, this breakdown, this treatment of Section 2 was unequivocally endorsed by him, and I'll come to the citations for that later.

Section 2, where are those claims filed? That's claims filed after the bar date. So it's a really bright-line test, Your Honor, it's not -- doesn't get into Grossman's issues or Frenville issues, or notice, or due process. It's when was the claim form filed; before or after the bar date. Very simple.

Are individual claims permitted under Section 2? Yes. Are class claims permitted? No. Section 2(a)(4) says, no class action treatment for Section 2 claims. Unequivocal.

What's the procedure after the effective dates for litigating Section 2 claims, the ones filed after the bar date? Number 1, you have this discharge motion, where 17 factors are looking at. It's basically the excusable neglect test, looking at when asbestos was installed, when they got notice and a whole series of factors. And if the claimant defeats that discharge motion, or if Grace doesn't bring one, the claim is tried in district court. Where? It can be here; it can be in any other jurisdiction. And that is federal question jurisdiction under Section 1331 and Section 1334(b). Diversity has nothing to do with it, the $75,000 argument in their brief was a red herring.

So, Anderson's -- what about Anderson's appeal to the class cert -- the order denying class cert?

THE COURT: Well, it doesn't mean I still

shouldn't have sympathy for the district court.

MR. DONLEY: Understood. Understood. Any court. But if that -- if there are claims that are worth $3,000, we haven't seen them yet, but if they are, they'll be dealt with.

Anderson really smudges and blurs the line between its interlocutory appeal and its regular appeal. We know that the interlocutory appeal of the -- of Judge Fitzgerald's order denying class cert was denied. It was denied in the district court, and then in 2009 the Third Circuit said it's interlocutory, it can't appeal.

But their regular, non-interlocutory appeal has been pending ever since. It was pending as to the February 2014 effective date. It's required, under the plan, to be inactive currently. We just looked at those provisions where it's reactivated and can be pursued only after the correct sequence is followed the individual claims is litigated to judgment. And that's 1(b)(3) that we looked at before.

And the irony of all of this, Your Honor, is that Anderson has owned the keys to this process all along. They could have fully litigated their individual claim, starting in February 2014. They said it could be done quickly, even if there was discovery, it probably could have been discovered and tried in two years and be done now, and their

appeal of the class cert denial could be running. They chose not to; they chose to proceed by motion practice.

Now what about this word "pending"? They say, well those provisions of Section 1 don't apply to us because our claim -- our class -- appeal of our class, of the order denying class cert was not, quote/unquote, "pending" as to the effective date, so we fall into some nether world, neither Section 1, nor Section 2. It's an absurd argument.

If it's true that their claim wasn't -- their appeal wasn't pending as of the effective date, it would mean their claims aren't in Section 1 or Section 2. We saw that the order says this covers everything. We know they're not in Section 2. And of course, this is the problem with them blurring the interlocutory appeal and a regular appeal. We know their --

THE COURT: All right. So let's explore the procedural niceties for a moment.

MR. DONLEY: Sure.

THE COURT: If Anderson were to have proceeded as Grace says it should have, and I guess still says it should, once that's disposed of, procedurally, how does the, what was then the appeal of denial and certification, how does that spring up?

MR. DONLEY: They file a notice of appeal with the district court. It's been stayed, under the plan, for a

certain amount of time. When a final, appealable judgment of their individual claim is entered, and that will be entered in an order of this Court, the procedure for notice of appeal kicks in. And they'll file a notice of appeal with the district court.

THE COURT: And I assume that you're correct about that, as a matter of process. So, if a new notice has to be filed, how can it be said that the earlier appeal is still pending?

MR. DONLEY: Because the definition of -- it's basic, plain language in black letter law. Black's Law Dictionary I have two slides down, the definition of pending -- pending doesn't mean actively under prosecution. It means, in this definition, the Sixth Edition, begun but not yet completed, during, before the conclusion of. Certainly the appeal -- the regular appeal, not the interlocutory appeal of the denial of class cert is still before its conclusion. It's prior to the completion of. It's unsettled and undetermined.

A waiting and occurrence or conclusion of action. A waiting, held in suspense, held inactive, as the plan says, that means pending.

In a period of continuance or indeterminacy. Again, that also applies. It's not actively being prosecuted, but pending means in a period of continuance or

indeterminacy. That appeal has been held in abeyance.

Finally, the last line of Black's Law Dictionary, an action or suit is pending from its inception until the rendition of final judgment. There's been no final judgment on their motion for class certification, only orders entered in interlocutory appeals.

So yeah, we normally think of pending as, you know, actively proceeding, and there are motions being argued, but pending also includes unsettled, undetermined, awaiting a continuance, in effect stayed, but pending. And that's where they have been since 2008, 2009, on their regular appeal. That's where they were, as of the effective date. And that's just straight black letter law in plain language reading.

And then beyond that, it is -- if we were to accept their interpretation, it's pretty absurd to look at the prior slide, I pulled out the language of Section (1)(b) of the PD-CMO. (1)(b)(2), (1)(b)(3) talk in detail, in name, naming the claim number of Anderson's claim and saying, these claims are treated under the section, in the following way. How would it make any sense to have them not covered by that section? Really, it would be an absurd reading, but you don't even need to get to the absurdity, you just deal with, I think the plain language of the meaning of the word pending.

Now, the next point I'd like to address, Your Honor, is the property damage case management order. They say, piece of cake, you can amend it. It's like a briefing schedule that the judge enters, you can amend it at any time, no impediment to that whatsoever, it's a mere scheduling order. Absolutely false. It is an integral part of the plan. And you don't need to take my word for it, Section 1.4 of the plan says, quote, each of the plan documents is an integral part of this plan, and that includes, I believe there are 37 exhibits, Exhibit 25 is the PD-CMO, and is hereby incorporated by reference and made a part of this plan."

The plan further says, in the next bullet point, and this is definition 170 in the plan, quote, plan means the first amended joint plan of reorganization, et cetera, et cetera, and the exhibits, in the bold second to last line, and schedules to the foregoing.

So the plan is not just, you know, the document that says plan of reorganization. It also has, as integral parts, all of -- and I've got the mini version, (indiscernible) if you print out the big ones, it also includes all of the 37, or so, exhibits as parts of the plan. And the last bullet point on this page says the same thing in Plan Definition 172, plan documents, quote/unquote, are defined as not just the joint plan, but also the exhibit

book and all exhibits in the exhibit book. Very standard, and that's true in many plans, of course, as Your Honor well knows.

And here's Judge Fitzgerald's confirmation order I referred to before, January 31st, 2011. She entered this order, absolutely correct that the Exhibit 25 wasn't separate tendered for signature, but she entered this confirmation order that said the plan, and all exhibits, and schedules thereto are amended, as amended to the date hereof are confirmed in each and every respect. That includes the PDCMO plan, Exhibit 25, the version -- the language we're talking about was identical on the version filed with the Court on December 8th, 2010. The cite is there, I mentioned that before. The language is the same on the version that's Exhibit A-1 to Anderson's September 2015 brief.

The district court and Third Circuit then affirmed the PDCMO and the plan, including the PDCMO, as an integral part, went effective and was substantially consummated in February of 2014.

AMH very actively contested the PDCMO. They briefed it, they argued it, I vividly remember long arguments and long briefs against these esteemed counsel, at the district court and Third Circuit, in addition to the confirmation hearing. And they aggressively objected to, in particular, the CMO regarding jurisdiction, venue, procedure

and sequencing of claims under Section 1 as compared to Section 2; that was the heart of their argument. Tons of pages of briefing and argument on that point. They've changed their objection to it over time, they're arguing something different now, but that subject matter was the subject of their objection.

Interestingly, they did not challenge or contest, as part of the confirmation hearing and appeal the placement of the provisions governing the appeal of -- denial of their class certification motion in Section 1 of the CMO; that's what they're challenging now. They say, we're not even part of Section 1 because of our contorted reading of the word "pending". Never raised that issue or said it at all, in fact, just the opposite.

What they did was they complained mightily, during the confirmation process and appeal how unfair it was for Anderson's claim to be singled out for this terrible draconian treatment in Section 1 of the CMO whereby the individual claim has to be litigated before the class -- appeal of the denial of class cert can be reactivated and litigated.

I quote from page 16 of their June 6th, 2013 Third Circuit brief, where they say, in the highlighted text that the Class 7-A CMO contains procedures that control how unresolved PD claims will be resolved, including provisions

that are directed exclusively to AMH. That was their objections, it's really singling us out; it's unfair treatment in paragraph 1(b) of the CMO. Never said one word one that Section 1 doesn't apply to us, it was unfair to put us in. That's a completely new, opposite argument they've brought out during this procedure before Your Honor.

THE COURT: So let me ask you this question. If I were to deny the motion for this reason and then after whatever other Court Anderson might ask to opine on the same issue, gets finished, but the result's the same, and then they try their individual claim, would it not then also be appropriate -- well, let me ask you this.

Would they be foreclosed from bringing this motion again, based on the fact that circumstances have changed? Or are they required to pursue the appeal instead, or first? What's your position on that?

MR. DONLEY: I don't know if they're foreclose -- I think it would be completely lacking in merit. Of course, I think their current motion is completely lacking merit --

THE COURT: Not --

MR. DONLEY: -- doesn't mean they're foreclosed.

THE COURT: -- the question that I asked.

MR. DONLEY: Are they foreclosed from bringing a motion for reconsideration? I think they are, because they're raised -- they've really -- I don't see what new,

germane in material has happened in the meantime.

THE COURT: No, you're dealing with the merits. I'm just talking process. It's not, would you win. It's, could they bring it under the terms of the plan and the CMO?

MR. DONLEY: So, let me make sure I'm following, maybe I didn't follow your question, Your Honor.

THE COURT: Could be I didn't ask it clearly enough.

MR. DONLEY: Well, so the situation is --

THE COURT: So, I deny the motion today.

MR. DONLEY: Yes.

THE COURT: And I'm not going to rule from the bench today. But I deny the motion today, the individual claim gets resolved, one way or the other and under Grace's version of what should happen, the appeal gets reinstated and they proceed. But after determination of the individual claim, is there anything that would present -- prevent Anderson from renewing this motion, saying that things have changed and we should certify a class?

MR. DONLEY: I don't believe that is a proper motion --

THE COURT: Okay.

MR. DONLEY: -- in direct answer to the question. The reason is, that possibility that their individual claim could either be granted or denied or have a ruling where

maybe they appeal part of it and don't, that's already baked into the plan in this procedure, so that eventuality happening in, you know, one of the possibilities for having their individual claim is resolved, is already baked in. And whichever way it comes out, their next step just has to follow the plan, that they have to reactivate, file their notice of appeal and pursue the appeal of denial of class cert.

THE COURT: Yeah, that question isn't before me today, but I'm not so convinced that you're correct.

Okay. You may proceed.

MR. DONLEY: All right. We think what they're doing is --

THE COURT: And by the way, I don't mean by that question to extend any invitations.

MR. DONLEY: All right. Changing to a related -- new but related topic, Your Honor. We think what they're doing is attempting a back door, maybe not even so back door, pretty direct, plan modification. And I don't need to educate Your Honor on what Section 1127(b) of the code says, just briefly --

THE COURT: No, because I don't know if -- we may have had this discussion before, but I write that section for the treaties.

MR. DONLEY: Yeah. So we're now not only after

confirmation, that window when plan proponents of the Debtor can revise, we're after substantial consummation and the door is foreclosed to plan amendments at this point. Plan Section 4.1.1 basically mimics 1127(b), it's baked into the plan. Maybe that's redundant and unnecessary, but it's in there as well.

The PDCMO itself, if you just look at that, is there some way that that can be modified now? And the answer is, no. The plan says that after the effective date, plan documents, they are an integral part of the plan, but if you look at just the plan documents, the exhibits, such as the PDCMO, they may be modified -- and maybe the time's run, because this says only after the effective date, or beyond that, we're past substantial consummation now. But even just after the effective date, plan documents, such as the PDCMO may be modified only as provided in the plan documents themselves. It's Section 4.1.2 of the plan I have cited there, and plan definition 172 says basically the same thing.

And I'm happy to supply hardcopies or electronic version of the PowerPoint slides, if the references are helpful, Your Honor.

And the PDCMO itself contains no provision for its modification. So modification by AMH, or urged by AMH, at this stage, is not permitted.

What about this final judgment issue, very prominently mentioned in the briefs, wasn't mentioned in argument? They say, well Grace, you're wrong when you say that confirmation of the plan is a final judgment on the merits of Anderson's class claim. That's not what we said; that's not what we're saying. But confirmation of the plan is a final judgment on the treatment sequence, jurisdiction, venue and procedures governing the Class 7-A PD claims that are set out in the CMO. And those are really I mean procedures. Those are not just like dates for a oral argument on a motion that can be changed by any judge in managing your courtroom, those provisions were integral to confirming a 524(g) plan.

I cite, just as one piece of testimony, Mr. Fink is here, deputy general counsel of Grace, he gave testimony at Docket 23475 during the confirmation hearing, of how integral those procedures in the PDCMO were. They ensure that the future PD asbestos claims would be subject to substantially and equivalent and fair procedures, as compared to two groups of people. Number one, the current claimants; it didn't have to be identical, but had to be substantially equivalent and fair. And number two, as between one future claimant and another future claimant. You couldn't have a situation where the plan was confirmable if one future claimant would be treated substantially

differently.

And these procedures and the sequencing were absolutely integral to achieving that equality and fairness and to getting the plan confirmed. So they were really integral to the plan and confirmation of the plan was entry of a final judgment, as to those issues. It didn't say anything about the merits of their class claim, which of course actually the plan expressly preserved their ability to keep litigating that.

These provisions were all very heavily negotiated, negotiated with the PD committee that Mr. Speights served on. They were actively litigated. They were confirmed. They were appealed. And the plan has now been substantially consummated.

Let me turn to the future claimants' representative's brief where he now says -- and Mr. Rich and Mr. Sanders have said they believe it's in the best interest of future claimants as they sit here today, to certify a class of traditional property damage claimants. That completely ignores, I believe it's a complete 180, Your Honor, in change of position. The future representative ignores the express language of the plan provisions that he endorsed, without equivocation, which said, and I quote, class action claims shall not be permitted, closed quote, for claims in Section 2 of the property damage CMO. That

includes all future Class 7-A PD claims, because Section 1 was for claims filed prior to the March 2003 bar date, Section 2 encompasses all future PMOs -- all future PD claims. And it's Section II(a)(4) of the CMO that says, and was -- there wasn't a line item endorsement by Mr. Sanders, I endorsed some provisions of the CMO and not others, he endorsed it straight out, and that included Provision 2(a)(4) saying class action claims shall not be permitted. Couldn't be clearer, the expressed language couldn't be clearer.

The future claim representative's testimony at the confirmation hearing established that he extensively negotiated that document, the PDCMO, and he unequivocally supported the plan's treatment of future claims in that document, which includes Section 2, which we just read, saying no class treatment for future claims. Period. And two pieces of testimony in particular, he testified quote, I participated in extensive negotiations with the Debtors with respect to the joint plan as treatment of future traditional asbestos PD claims, and I had a significant role in drafting the operative legal documents that established that treatment. These include the Class A -- 7-A case management order with respect to future claims.

Never a peep, nothing in the record, no suggestion before today or his brief, that we want to -- or think it's

better to have a class treatment for Section 2 claims. Just never occurred.

Further testimony from Mr. Sanders. The plan, quote, treats future holders of traditional PD claims or demands -- again, I put it in brackets, those are Section 2 claims -- fairly and equitably. Fairly and equitably, and on terms substantially similar to the current traditional PD claims, those are the Section 1 claims filed by the bar date, by providing mechanisms by which all valid, current and future claims shall be treated and paid on substantially similar terms.

So the record is the record. We can quibble about whether it's a change of position now or not, I think it is, I think it's pretty clear that it is, but it's really beside the point. It's of no legal relevance if he's urging a different position now. This is what the testimony was, this is when it went into the confirmed plan, the terms have been confirmed, upheld on appeal and substantially consummates. And there's zero legal relevance to the FCR advocating different treatment now after the fact.

I'll be very brief on this next point. In fact, I'll take 20 seconds or less, because he didn't mention it in his oral argument, but they mention it in their reply, and I didn't have a surreply, Your Honor. We pointed out that there's never been a case -- this seems -- the relief

they're asking for is unprecedented when -- where there's a class certification denial, in a bankruptcy case, pre-confirmation, and then a motion for reconsideration post-confirmation. And they came back and said, no, no there's the (indiscernible) in the Southern District of New York and there's the F-Squared case here, that's exactly what happened there.

That's not true at all. There was no -- pre-confirmation there was no hearing on a motion to certify a class in either of those cases. Yes, after confirmation there was agreement by all the parties, by the Court, prior to confirmation, that there would be a hearing. In fact, it was even scheduled for two months after confirmation in (indiscernible) 2:34:45. And then it took place because they were expedited Chapter 11's. Everybody agreed, basically that these can pass through and the hearing can take place later.

So we're not saying -- we didn't say that a motion to certify a class can never take place after confirmation. It was agreed to and understood in these two cases. But it is -- we've looked for a case, and they haven't pointed one to us, it is at least unprecedented, certainly unusual, to have an order six years before the effective date, denying class cert and then after confirmation, the matter brought up on a motion for reconsideration, certainly very unusual.

On the merits. The four factors that weren't addressed by Judge Fitzgerald, they suggested or said in their brief that she went their way on these factors. No, they just weren't addressed because she didn't have to get to them.

THE COURT: I agree.

MR. DONLEY: And so -- but these were addressed in the original round of briefing back in 2014 and '15. So let me just respond briefly. Commonality, we believe, is absent here. The 17 highly individualized factors including installation, removal, damages, also statute of limitations, all very, very individualized. We don't see the commonality among the claims, at all. And that's very different from some of the cases they've cited.

Predominance. They ignored the showing entirely, didn't make it, didn't support it.

Typicality. This is, in our view, a classic, intricate class conflict. Anderson, in our judgment, just is not in a position. They have a built-in conflict in representing many claimants. You know, maybe the opt-out is a partial relief valve for that, but they filed their claim on time and they're really in a -- as we said in our brief, I won't belabor it, they're in a very different position, not equipped to represent others.

The two cases on typicality they cited, by the

way, Whirlpool, this it was remanded to the Sixth Circuit, but in their opening brief they should have noted that it was vacated. It's not good law; it's not a precedent.

And Pella, which is another Seventh Circuit case, there were two classes in Pella. One was a 23(b)(2) declaratory judgment class, that's not germane here. Then there was -- the germane class was the 23(b)(3) class that was certified for consumers who bought Pella windows. Totally different fact situation. These were all claimants who had not only manifested injuries but wood rot in their windows had all been manifested, known, and they replaced them with replacement windows already. All manifested.

Very different from here where you have a whole range of class members, or potential class members, some of whom may not know they have asbestos in their building, maybe some 7-A claimant finds out tomorrow, during a repair, that he or she has asbestos found knocking out a wall, brings a claim and says, I'm not subject to the bar date.

You have other people who found out maybe at some interim point in time and maybe it raises an Owens Corning versus Wright issue of a so called gap claim. There's a whole range of people. Pella, everybody was the same, everybody had a very mature, manifest claim, so not relevant.

On fair and adequate reputation, that's similar,

related to typicality. Here, you know, the district court and the Third Circuit both found that AMH lacked standing to argue Grossman's type issues, due process issues on behalf of post-bar date claimants, the claimants we believe are in Section 2. And they really didn't distinguish or mention Anderson in its individual capacity or its capacity as a class rep, just lacked stand, period, without making that distinction, is what the Third Circuit said.

On superiority. I kind of flinched when I heard it said that superiority was not decided because it may not have been the main point, but it was certainly in Judge Fitzgerald's opinion, as Your Honor knows, and Judge Buckwalter. They say it's dicta, maybe it is maybe it isn't. But Judge Buckwalter also addressed that and agreed.

But their main argument for superiority, which they repeat many, many, many times in their brief, is they say, geez, the fundamental question is whether class litigation under Section 1 is superior to individual litigation under Section 2. I lost count of how many times, over a dozen times in their brief, that's the question they say. And of course, Mr. Speights believes that it is.

But it's an academic question, it's a false question because the plan expressly forecloses that option. We looked at that plan language before in Section 2(a)(4). The class approach is available under Section 1, yes, but

only if the steps are taken to litigate the individual claim and then follow the other steps set forth with the appeal, and if they're successful, the remand. Those are provisions that Anderson's bound to follow.

It may be an interesting academic exercise, it may be an interesting exercise on class actions -- it is a fascinating, interesting topic. But it's not available here. So that basis for superiority is foreclosed and it's binding because the plan is binding on creditors such as AMH, at this point.

Numerosity. In Anderson's September 2015 brief, at page 62, they made a very interesting statement, admission. Quote, there is no evidence that any building owners even, quote, know they have accrued claims against Grace or right to file claims. It's different from a quote in their reply brief that I'm going to cite in just a minute. But I mean, if that's true that really undermines them on numerosity and takes us back -- we've been a long way, so if I can inject a little levity.

My old friend, the Maytag repairman is on my next slide. And we look at, he's still waiting. The total number of claims that have been filed since emergence over 2 1/2 years, there's one claim, it's not a building owner or a putative number of Anderson's class, so I said total number of claims within Anderson's class, zero. It's a Timberland

owner that's the subject of separate briefing under Section 2 that's -- I believe the briefing is going to be completed before Your Honor next week, by a company called Plumb Creek, a timber company out in Libby, Montana. So, there's not been much action; there still could be.

Here's the other statement on numerosity they made, I wanted to point out, which seemed different from their first statement. This is from their reply brief on April 11th of this year Anderson filed at page 27. They said, quote, each class member can produce invoices and/or asbestos-containing product to be sampled and tested, to establish members -- membership, meaning in Anderson's putative class, once a claim process is established.

My question is, Your Honor, is if that's true, they've got the invoices, they've got the asbestos materials, they're at their fingertips as Anderson's represents here, or suggests. Why haven't -- hasn't anyone filed them? Especially when class certification is very much in peril, we think in great peril, because we don't think it's merited and it's already been denied once. And that's pretty thin ice to be grounding a claim on.

It's real simple to file your claim and preserve your rights, why hasn't another, even one person in 2 1/2 years done that? We just think it shows a lack of credibility to the assertion that there is -- that

numerosity has been satisfied.

I'll finish just by addressing a couple of Mr. Speights's points from his argument. On numerosity, he said we admitted it in the South Carolina amended complaint. I won't repeat our briefs. We gave four cites at page 24 --

THE COURT: I know you dispute it.

MR. DONLEY: -- where we disputed that. Dr. Martin, the expert's testimony at the trial, again, I won't repeat the quotes in our brief, there's a lengthy discussion. There are two prongs under 524(g), you have to make a showing that future demands, as it's called, meaning future claims, basically -- substantial future demands, it's likely they will occur and the amount, number and timing are indeterminate. That's what she testified, she said, I've look at the record, I believe it's likely. I'm predicting the future, so I can't say for sure, and there's no estoppel here at all, as they say in their briefs, because that's a good faith estimate by an expert in 2009 about what is likely to happen in the future.

She said, yeah, it's likely there will be substantial claims. She didn't say more than 47. She didn't say more than five. She didn't say 20. In fact, to the contrary, she said they can't be quantified, we don't know enough. It's indeterminate. And so there was no concession of numerosity there, even if 40 was a bright-line

test, with all deference to Professor Miller, very engaging professor. You know, he doesn't sit on any court, there's no bright-line test of 40. There were 47 in United Companies, there were 291, I think, in Kaiser, those two case before Judge Walrath that they cited, but those weren't dispositive of numerosity.

In United Companies, Judge Walrath also denied certification of a class of I think it was home repair owners, more on superiality (sic) and commonality issues than on numerosity so much, but those were factors in those decisions to certify a class in her discretion there, looking at all the factors of numerosity, superiority. There was no per se rule that if you have 47 claimants it's automatically in. There's no law that says that.

Masonry fill was only briefly mentioned at all in -- it was mentioned in the first round of briefing a year and a half ago, only very briefly mentioned -- I don't recall where it was at all, in the most recent briefing. That's why we didn't address it.

And as we said in our first round of briefs, because it's almost two years ago, on masonry fill, the company never even got sued once pre-petition, on masonry fill. They just weren't litigating claims. We've seen no proofs of claim for them. There were lots and lots of ZAI attic fill proofs of claim filed, so people who were

homeowners, who had an issue or had relatively low dollar amounts.

And by -- just as an aside, Your Honor, when he says the dollar amount in claims the site very low, the majority are below $75,000, I think if there are class members out there, there's quite a few who would dispute that, I believe. If you just look at the average allowed claim that we paid in this case, there were 407 allowed Class 7-A PD claims that were paid for approximately 150 -- I think it was $150.8 million. And that's about, I think $375,000 per claim, on average, some of them worth multi-millions. So there's a real range here, many of the claims highly valuable, if the claims are valid and they can survive the legal and factual showings they have to make.

But on masonry fill, in contrast, we know people with attic fill filed lots, and lots, and lots of claims. There was a trial, there was a settlement class. Settlement class totally distinct from the class we're talking about for ZAI. Masonry fill nobody's ever shown up. So is it possible that those claims may be filed later? Sure, it is, but it's completely speculative. There's no evidence in the record, and the record suggests, pretty strongly to the contrary, that there will be few, if any masonry fill claims.

If I could just have one moment to look at my

notes, Your Honor?

THE COURT: Certainly.

MR. DONLEY: Just a couple last response points. Yeah, the 1984 schools case, that sure was an old case, and that's not new law that justifies and supports a motion for reconsideration.

The Neale versus Volvo case that they mentioned just briefly in their reply, it was a sunroof design defect that was common, same exact defect, same facts, expert, legal issues applicable to everybody who bought the Volvo cars. Just totally distinct, doesn't justify class certification in this situation, where a wide variety of fact patterns, exposure, histories, damages, statute of limitations for a wide variety of building owners and uses of asbestos.

Richard, anything else? Your Honor, happy to answer any questions, and I thank you for your time and indulging me going on so long, but that finishes my argument, unless you have questions.

THE COURT: I have no questions. Thank you.

MR. DONLEY: Thank you, sir.

THE COURT: Mr. Speights? Oh.

MR. DONLEY: Yeah, let me take down my --

MR. ROSENDORF: Your Honor --

MR. DONLEY: -- get this out of your way.

MR. ROSENDORF: Dismantle there?

MR. SPEIGHTS: Yeah.

MR. ROSENDORF: Your Honor, with the Court's permission, I would like to address the procedural issues that have been raised by Grace and Mr. Speights will close on the class issues and reply; if that's okay.

THE COURT: That's fine.

MR. ROSENDORF: Thank you, Your Honor. Your Honor, my purpose here is primarily to respond to the arguments raised by Grace asserting, in effect, that the plan is a barrier to this Court's even entertaining of this motion for reconsideration, even after this Court entered an order directing the parties to brief the issues of class certification.

And we have, in substance, I think four responses to that. First, the order, the PDCMO on which Grace relies, has not even been entered by this Court. Secondly, even if it had been entered, it is not a final judgment on anything, certainly not Rule 23 class certification or the underlying merits of the AMH claim, either individual or class claim. It is, as it describes itself, a case management order, that addresses issues of scheduling and sequencing.

Third, even if this order had been entered, its terms, by the expressed language of the PDCMO itself, at least those that Grace seeks to rely upon here, do not apply

to the Anderson class claim.

And finally, Your Honor, as Mr. Speights has already started to argue, and as we can demonstrate, circumstances have so changed since the original class certification order was entered, that in any event there is no reason for this Court not entertain reconsideration of class certification at this time.

So let me turn to the first issue, which this Court raised, which is the same question that we have been asking, which is why was this order never submitted for entry? Why has it never been entered? And what does that mean? We would submit that what it means is that if Grace seeks to rely upon this order, it should seek the Court's entry of the order, it should file a certification or motion for entry of order, at which point issues with respect to the scheduling and sequencing order, as they now exist, as known to the Court, could be addressed. But the reality is, that never happened. That didn't happen.

And for Grace to suggest now that because the order was a plan exhibit that it is so set in stone that it can't be modified or altered, is frankly somewhat absurd if you just look at the order itself. Because if you review the order as it is included in Grace's submissions in connection with this briefing, it's full of blanks. The scheduling order doesn't even have a schedule in it, it has

no dates for the things that are supposed to happen in that order. So if you just look at the exhibit that they have provided themselves, it is clear that this order cannot be operative, cannot be so set in stone that it is incapable of being altered. It is nothing of the sort.

So we would submit, in the first place, that Grace's reliance upon this order is entirely misplaced, because in fact no PDCMO has been entered.

But Your Honor, if you then actually look at the order, its language does not apply to the AMH claim. In particular, Your Honor, what Grace is relying upon are the provisions in Section 1(b) 1, 2 and 3 of this order, which appear on pages 1 and 2 of the order.

But in order to figure out what 1, 2 and 3 apply to, you actually have to read Section 1(b) in the first place. And 1(b) refers to claims which have been disallowed or expunged by the bankruptcy court and for which the holders of such claims have filed appeals, which appeals are pending as of the effective date. Or, two, as to which class certification has been denied, and an appeal from such certification is pending as of the effective date.

AMH did file a class certification motion, that motion was denied by Judge Fitzgerald. AMH did file an appeal of that denial, that appeal was taken through the district court and to the Third Circuit of Appeal, which

dismissed the appeal on December 24th, 2009. As of, and after that date, there was no appeal pending of class certification in this case. Now, in the demonstrative that counsel provided here, the sort of sub rosa surreply that we got as we walked into court today.

They have argued that Anderson's, what they call, regular, non-interlocutory appeal is pending and is still pending as of this moment. I, frankly, have no idea what appeal Grace is talking about. What court is that appeal pending in? What is the docket number of that appeal? There is no such appeal, there is no case pending.

And indeed, after an extensive citation to Black's Law Dictionary, as to the definition of "pending," there's an interesting slip of the tongue on page 7 of these slides here, when they say, there is no final judgment on AMH's class claim, or denial of a motion to certify its class.

Therefore, it's class claims remain pending. This is not about Anderson's class claims, that is not the language that was used in the PDCMO. The PDCMO referred to pending appeals and there is no such thing.

So by the plain language of the PDCMO, Section 1(b) does not include the AMH class claim, because there was no appeal pending as of the effective date in 2014. What that means is that all of these provisions that they seek to apply as procedural bars to consideration of a motion to

reconsider on Anderson, simply do not apply.

Now, the other subcomponent of their argument here --

THE COURT: So let me ask you this question. What do you -- if it doesn't apply, what do you think the provisions that you're discussing were intended to do?

MR. ROSENDORF: I was not their drafter. And while counsel said that the PD committee was consulted on their drafting, and that Mr. Speights was a member of the Committee, Mr. Speights obviously does not control that Committee, and Anderson was never consulted on these procedures. I cannot speak to their intent; I can speak to their application. And their application as to pending appeals very well may make sense, because while there is an appeal pending, there is a certain logic to holding, in abeyance, the underlying claim.

But when there is no such appeal pending, that logic, to the extent there is any, no longer applies. So I can't read into the intent, I won't speculate on the intent. But as to the application, if there is no appeal pending, these provisions do not apply.

THE COURT: So let's say I agree with you. Do I have the discretion to require the process that the Debtor says should be followed, in any event?

MR. ROSENDORF: I think this Court always retains

discretion over the managing of its docket. And I think that what we would welcome the Court to do is to manage its docket in a way that makes for an efficient use of both this Court's resources and the potential resources of appellate courts that are going to hear this. And indeed, as reasons that I'm sure Mr. Speights can tell you in a lot more detail, we believe that the efficient use of this Court's docket is to address the issue of class conference first before going down the road of trying the individual claim, and apparently, as the Debtor now argues, not only trying that claim, but apparently taking appeals from that as well.

Now the Court brought up an interesting question to the Debtor, which I don't understand their answer to, which is that the Debtor seems to say that even after the AMH individual claim has been trialed -- tried, that this Court still lacks authority, it is barred by the plan, from even considering, reconsideration of the AMH class claim. I don't see that anywhere in the PDCMO.

It's certainly not in one. It's not in two, the provision that Grace relies upon, says the Anderson class claims shall remain inactive unless and until there is a final appealable order with respect to the Anderson individual claim.

THE COURT: Look, the issues not before me today. I tend to agree with you, but if there comes a time when I

should face the question, I'll address it after appropriate pleadings and arguments.

MR. ROSENDORF: Fair enough, Your Honor. But from our perspective, it simply highlights what I think is the absurdity of the notion that this Court lacks the discretion to manage its own docket because of the language in a proposed case management order that was originally drafted more than seven years ago, 2009. And we would submit that for purposes of procedure, of sequencing, that this Court always retains the discretion, under an interlocutory order that it has entered, to revisit those issues of scheduling and sequencing.

And on that point, I want to address further the notion that the Debtor has advanced, that Grace has advanced, that the plan constitutes a final judgment. And in their briefs they argue this by saying that Rule 23 prohibits reconsideration after a final --

THE COURT: Look, I tend to agree with you --

MR. ROSENDORF: -- judgment's been entered.

THE COURT: -- as you just articulated that proposition. The plan deals, in final ways, with any number of things, but I don't think with respect to this issue.

MR. ROSENDORF: Very well, Your Honor, then I won't belabor the point because again, we believe this is a sequencing issue, it's not a final judgment on any issues of

the merits.

So Your Honor, let me turn to some of the comments that were made in Grace's argument. They suggested, for instance, that we did not challenge the appeal provisions of the PDCMO when we took this up on appeal. I think for reasons that we have just discussed and explained, that was not the concern of the appeal, the appeal addressed other issues of unequal treatment.

THE COURT: Well, I'm not sure it's relevant either way, because the plan and the order say what they say.

MR. ROSENDORF: Thank you, Your Honor. Again, with respect to the whole issue of plan modification, I am certainly not going to try to educate somebody who knows a lot more than me on that subject, but I would submit that treating the updating of a case management order entered in conjunction with the plan is simply not nearly the same thing, first of all, as modifying the plan itself.

And secondly, as Grace noted, the plan itself does say that the plan exhibits can be modified according to their terms. Well, the case management order is an interlocutory order, it is a scheduling order, and any such scheduling order of this Court, by its terms, is susceptible to modification. So --

THE COURT: But I will say, while I did not sit on

the confirmation of this case -- of the plan in this case, I have had cases in which there have been individual claims which were corralled into, I purposely didn't use the word "channeled" into either an ADR type of process or a claims disposition type of process. So the fact that -- and they are all, in my experience, fairly important to how part of the plan is to be carried out.

So I -- you know, this is not -- I don't think this is quote, just a scheduling order.

MR. ROSENDORF: I understand that, Your Honor. But I think that we have to focus in particular on what's at issue here, which really is, at the heart, just a matter of sequencing. Do you address issues of reconsideration of class certification now, when you have the opportunity to do so, or do you go down the path suggested by Grace of trying the individual Anderson Memorial claim, forcing an appeal, going through that whole route, before even addressing the question --

THE COURT: Wait, maybe you'll win.

MR. ROSENDORF: -- of whether --

THE COURT: Maybe you'll wain.

MR. ROSENDORF: Right. But then winning means it just comes back to you after -- you know, on a record before the Third Circuit of a class certification order that was entered eight years ago before, Frenville was reserved,

before Grossman and Owens Corning, before all of those things, before the Debtor proposed a hundred cent plan, before the Debtor agreed to the appointment of a future claims representative.

THE COURT: Look, I'll just say I appreciate everyone's concern about my caseload. Thank you so much.

MR. ROSENDORF: You know, or do we deal with those issues now? And what's interesting, Your Honor, is -- and I understand what you've just described which is that there are some processes that are very integral to the plan. What you have not heard from Grace, for a moment, is how this particular process and the order of consideration of either class certification or trial of the individual claims has any impact whatsoever on Grace, or how it is harmed. How the process of the plan or the trust are in any way impaired by that; you've not even heard a suggestion of it.

THE COURT: Look, it -- you know, that may not be relevant. It's either required by the plan and the order, or it's not.

MR. ROSENDORF: Your Honor, the -- a couple of other additional points that I would just like to address. One of the things that was argued, and this was more directed to the future claims representative's joinder, is the provisions of the PDCMO, purporting to prohibit what Grace describes as Section 2 claimants from filing class

action claims. What is notably omitted from Grace's discussion of that, in which they effectively try to argue that because of that provision Anderson is prohibited from pursuing a class claim that would include otherwise Section 2 claimants, what they don't mention is what appears immediately after Section -- within Section 2(a)(4) where the provision itself says that this provision shall not be construed to require the dismissal of or require any particular ruling with respect to class certification, in any subsequent proceedings on remand, if any, from any such pending appeals with respect to Anderson.

They are now arguing exactly what their own PDCMO says it would not do. And so we would submit that that, as well, is no bar to this Court's consideration of Anderson's motion.

THE COURT: Thank you.

Mr. Speights, I encourage you to be brief, if you are able.

MR. SPEIGHTS: I'll try to talk faster, Your Honor, but it's not the way we speak --

THE COURT: Talking fast --

MR. SPEIGHTS: -- where I'm from.

THE COURT: -- is not your style, sir. I understand this.

MR. SPEIGHTS: Quickly. Maytag defense, we've

cited in the brief, and you've read it. The absence of claims support certification, big point. Mr. Donley complete -- continues to argue this, he's arguing against commonality and predominance, et cetera, because of the 17 individual factors that a claimant must go through when he's running the gauntlet. All members of the class, if certified, are in Category A/Section 1. None of them have to run the gauntlet, there is no commonality or predominance issue, all are in here. Even though who are future claimants, represented by Mr. Sanders, are in Section 1.

Mr. Donley mentioned there's a conflict between Anderson and the rest of the class, because Anderson is a superior claimant. Well, thank you for the compliment of Anderson, but the reality is, the law says that's the type of claimant you want. I cite Judge Posner being quoted by the Third Circuit's case in Neale, July 2015, talking about adequacy, there is nothing wrong with the class claimant being strong, what you don't want is a weak class claimant.

Post-bankruptcy consideration. I don't know whether there's any case out there or not, but I do know in this case it was not until the plan was affirmed and went active, that the basis of the reconsideration, their motion to alter or amend, existed, because it was the plan that was confirmed that provided for 100 cents on the dollar, and all this different treatment that triggered the filing of the

motion to alter or amend in this case.

PD committee. I don't think this is a big issue, Your Honor. I was co-chair of the PD committee. I'll admit that my memory is not what it used to be, I don't think there's anything in the records saying the PD committee participated in the drafting of this document, nor do I have any recollection of that.

Two more points, Your Honor. I always return to masonry fill. You know, I started as class representative, as class counsel, think about it as people who have no idea (indiscernible) have a claim. And there's been no dispute of what I said. But what is important is, while counsel says he didn't remember masonry fill being discussed in our brief, we discuss masonry fill 14 different times in our brief. Never mention? We discuss masonry fill or mention it 44 times in our briefing before Your Honor. And in their brief, they don't say anything, and I understand why they don't say anything, they don't have an answer to masonry fill. It's not in the bar date notice, it's sitting out there, these people.

Judge Sanders and I are both concerned about these people having an opportunity. We representative truth and justice, we want these people to have their day. We will actively try to do that, and to give them an opportunity to make a claim. This is not a gotcha game; this is an

opportunity for these people to participate in the class, and particularly for those people who had the exact same product of ZAI and not going to get a penny out of this because they have no idea until they knock down that wall and then they're faced with this problem.

Lastly, Your Honor, you talked about discretion, you asked Mr. Rosendorf if you had discretion. And he, of course, answered that question. This is the situation I find myself in, in representing Anderson. If Your Honor says to Anderson and its counsel, well you've got to first come and try this case before me, individually. And we'll all run out and do a bunch of discovery, you know, some of the witnesses will be changed. Mr. Donley will run down to South Carolina and visit the hospital, I'm sure. I'll run to Tampa where his leading expert is now retired, but ready to testify again, I'm sure.

We'll do all this work. And we'll come here and try the case. And you'll rule one way or the other, and then, according to them, we'd have to appeal to the district court on the Third Circuit, eventually. If I win in the district court, he'll appeal to the Third Circuit. If he wins in the district court, I'll appeal it to the Third Circuit. Again, that's assuming you can't just decide right then and trigger the filing of it, which I understand you will require briefing on that, if you want that issue

addressed.

But we go through all of that and then I'm standing up in the Third Circuit arguing against Judge Fitzgerald's denial of class certification, which is completely irrelevant to reality. Whatever Judge Fitzgerald decided is not the existence of what is now before Your Honor, because of the plan. The plan changed everything, and everything has changed.

So if I win in the Third Circuit, all I do is to come back before you and argue again, well -- you know, certify again. They'll move to reconsider everything. If I lose in the Third Circuit -- I mean, it -- this is just a never ending thing. I'm worried about the time, as class counsel, that all of this is going to take.

And to the extent that you have discretion, I would urge you to exercise the discretion and let's decide this one way or the other. If Your Honor declines to certify -- to consider class certification, and declines to certify, then the individual claims will start coming on and we'll deal with it. But to require us to appeal, after we go through a trial, we're just buying several years of litigation that's unnecessary. Thank you, Your Honor.

THE COURT: Thank you. Mr. Sanders, would you like a few words at this point?

MR. RICH: Yes. Between Judge Sanders and I,

we'll be done before 3:15, we'll make this very quick. I just wanted to make one comment about counsel's assertion that, again, we have somehow -- we are somehow precluded, or our Class 2 claimants are somehow precluded from participating in the Anderson class action.

Now I was certainly involved in drafting the documents and Mr. Rosendorf was certainly to correct to point out that Mr. Donley omitted 90 percent of the clause that he quoted. That clause that says, class action shall not be permitted, was qualified in its entirely by what says essentially -- but whatever happens in Anderson, whatever the Court orders in Anderson controls.

And that's -- we're not arguing anything different from that, and we think that's a very important point of the provision. So if the Third Circuit, or if this Court, eventually or the Third Circuit, eventually, decides that there should be a class action, and that definition happens to include people who are in the second track, well then that controls, over the provision that says no class actions.

What that no class action provision is meant to do was to make sure that there were none others, other than Anderson, that there won't be any new class actions brought. And of course that's not what's happening here today, no one's arguing that somebody else is going to come in and

file a new class action, nor would we endorse such a thing. So that's what I wanted to clarify for the Court.

And Judge Sanders had wanted to comment.

MR. SANDERS: Your Honor, this matter in the name of Anderson Memorial has been pending, to my knowledge, for almost a quarter of a century. These are good lawyers and men of good will on both sides. They do everything except talk to each other.

If an experienced mediator could be brought to bear on this matter, it wouldn't take up much time, it's altogether possible that this thing might be resolved in my lifetime, otherwise I don't believe I'm going to be able to outlive it.

THE COURT: And I'll probably be off the bench.

MR. SANDERS: Give us a mediator. See if he can put them together.

THE COURT: All right. Thank you.

MR. DONLEY: May I respond to just one point, briefly, Your Honor.

THE COURT: Yeah, once you tell me whether you think you should go to mediation or not, yes.

MR. DONLEY: Okay. On mediation, I'd certainly like to confer with my client on that. There -- I can report to Your Honor, because I've been involved in even a small fraction of them, there have been very extensive settlement

discussions for years and years on this claim, with Mr. Speights, Mr. Fink having dialogue. I've sat in or participated, briefly, in a couple of them. So candidly, I don't think mediation would be effective at this point. I think the experience from those settlement discussions is the gap is so big and my client corral me if I'm talking out of school here. And I would like to have a chance to caucus with the client before giving a final answer, but that's my just candid first impression, that it probably wouldn't be effective.

THE COURT: All right. Well --

MR. DONLEY: We're always happy to talk. But the one point I wanted to respond to was the point in Mr. Speights's reply brief and argument about the -- on numerosity and the paucity of claims supporting numerosity.

Very briefly, Your Honor, the case they rely on is the Community Bank of Northern Virginia case, a 2005 Third Circuit case, fairly old case, so around before the first class cert hearing, in fact. But that was a very different situation. It was a settlement class, there were more than 40,000 claims for a home mortgage forum alleged fraud. The claims were very low value, 200 to $950. And the 44,000 people had -- in the settlement class had been told, ten years before, that the case had been settled on their behalf and they didn't need to file a proof of claim, and that's

why they didn't file. So just the facts just don't really match up. I don't think it's really germane or helpful to our sit.

THE COURT: Thank you.

MR. DONLEY: Thank you, Your Honor. Oh, just a point of Your Honor's practice, I'm not urging it. I did cite from the PowerPoint with many citations. Is it Your Honor's preference that I mark this as an exhibit to the hearing record? I'd be happy to, if Your Honor prefers that, but I -- however Your Honor would like me to proceed.

THE COURT: I'll take it as a demonstrative.

MR. DONLEY: All right. Should I hand that to --

THE COURT: Just give it to me. Thank you.

And Mr. Speights, for your benefit, it is only a demonstrative.

MR. SPEIGHTS: Thank you, Your Honor. And I do not wish to -- well, I might wish to, but I'm going to argue anymore. But I do want to respond to your question about mediation.

THE COURT: Yes.

MR. SPEIGHTS: And I'm sure Mr. Donley is not aware of the history of this, having inherited this case, but I'm aware of no settlement discussions that have taken place since we -- since the effective date and we filed this motion shortly thereafter.

I have, over the years, settled individual cases with Grace and I did have some, I wouldn't call it an extensive, settlement discussions with Grace prior to the Third Circuit ruling on the confirmation. But from my standpoint, I can tell you that my client would be delighted to participate in mediation, having just done so -- Anderson just participated in a successful mediation with the U.S. Mineral Trust. So I always think it's worth a try. Thank you, Your Honor.

THE COURT: All right. Thank you. I tell my law clerks that all the easy and moderately hard stuff gets settled, but the really hard stuff comes here. And that's okay. Is there anything further for today, Mr. O'Neil?

MR. SPEIGHTS: No, Your Honor.

THE COURT: Thank you all very much. That concludes this hearing. I will take the matter under advisement and issue a decision in due course.

Court will stand adjourned.

MR. SPEIGHTS: Thank you, Your Honor.

MR. RICH: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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